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No. 496

In the Supreme Court of the United States

OCTOBER TERM, 1932

DAVID BURNET, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

ERNEST BROOKS, HAROLD WILSON BROOKS, AND WALTER DOUGLAS BROOKS, AS EXECUTORS OF THE WILL OF ERNEST AUGUSTUS BROOKS

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONER

INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions involved	2
Statutes and regulations involved	2
Statement	2
Specifications of error	4
Summary of argument	4
Argument:	
I. The Revenue Act of 1924 treated intangibles the evidences of which are physically present in the United States as property situated in the United States	7
II. The statute as so construed is constitutional	16
Conclusion	29
Appendix	30–32

CITATIONS

Cases:	
Baldwin v. *Missouri*, 281 U. S. 586	7
Bank of Commerce v. *Tennessee*, 161 U. S. 134	20
Beidler v. *South Carolina Tax Comm.*, 282 U. S. 1	7
Blackstone v. *Miller*, 188 U. S. 189	9, 10
Brewster v. *Gage*, 280 U. S. 327	12
Burnet v. *Chicago Portrait Co.*, 285 U. S. 1	23
Cohan v. *Commissioner*, 39 F. (2d) 540	20
Commissioner v. *S. A. Woods Mach. Co.*, 57 F. (2d) 635, certiorari denied Oct. 10, 1932	20
Cook v. *Tait*, 265 U. S. 47	25, 26
Cream of Wheat Co. v. *Grand Forks*, 253 U. S. 325	19
DeGanay v. *Lederer*, 250 U. S. 376	9, 11, 28
Dewing v. *Perdicaries*, 96 U. S. 193	20
Eidman v. *Martinez*, 184 U. S. 578	8
Farmers' Loan & Trust Co. v. *Bowers* (S. D. N. Y.), reported in 313 C. C. H. 8877	23
Farmers' Loan & Tr. Co. v. *Minnesota*, 280 U. S. 204	7, 10, 23, 29
First National Bank v. *Maine*, 284 U. S. 312	7, 17, 19
Frick v. *Pennsylvania*, 268 U. S. 473	21
Green v. *Van Buskirk*, 7 Wall. 139	20
Heiner v. *Colonial Trust Co.*, 275 U. S. 232	10, 11
Heiner v. *Donnan*, 285 U. S. 312	21
Hill v. *Carter*, 47 F. (2d) 869	19
Holman v. *Johnson*, 1 Cowp. 341	23

Cases—Continued. Page

Kepner v. *United States*, 195 U. S. 100 10
Knowlton v. *Moore*, 178 U. S. 41 22
Miami Coal Co. v. *Fox*, 176 N. E. 11 19
National Lead Co. v. *United States*, 252 U. S. 140 12
New Orleans v. *Stempel*, 175 U. S. 309 29
St. Louis v. *The Ferry Co.*, 11 Wall. 423 20
Safe Deposit & T. Co. v. *Virginia*, 280 U. S. 83 ..... 19, 20, 28
Shenton v. *United States*, 53 F. (2d) 249 13
Tyler v. *United States*, 281 U. S. 497 21
United States v. *Bennett*, 232 U. S. 299 ..... 24, 25, 26
United States v. *Kirby Lumber Co.*, 284 U. S. 1 20
Wheeler v. *Sohmer*, 233 U. S. 434 9
Willcuts v. *Bunn*, 282 U. S. 216 22
Wright v. *Georgia R. R. & Banking Co.*, 216 U. S. 420 20

Statutes:
Act of October 3, 1913, c. 16, Sec. II, A, 38 Stat. 166 9
Revenue Act of 1916, c. 463, 39 Stat. 756—
Sec. 202 (c) 15
Revenue Act of 1918, c. 18, 40 Stat. 1057—
Sec. 403 (b) 12
Revenue Act of 1921, c. 136, 42 Stat. 227—
Sec. 403 (b) 12
Revenue Act of 1924, c. 234, 43 Stat. 253—
Sec. 301 (U. S. C., Title 26, sec. 1092) 30
Sec. 302 (U. S. C., Title 26, sec. 1094) 30
Sec. 303 (U. S. C., Title 26, sec. 1095) 30
Sec. 319 (U. S. C., Title 26, sec. 1131) 15
Revenue Act of 1926, c. 27, 44 Stat. 9—
Sec. 303 (b) (U. S. C. App., Title 26, sec. 1095) 12
Sec. 324 (U. S. C. App., Title 26, sec. 1121) 16

Treasury Regulations:
Regulations 37, Art. 60 11
Regulations 63, Art. 53 11
Regulations 67, Art. 18 15
Regulations 68—
Art. 11 31
Art. 50 32
Regulations 70 (1926 Ed.), Art. 50 12
Regulations 70 (1929 Ed.), Art. 50 12

Miscellaneous:
Desty on Taxation, Vol. 1, p. 53 27
Hanson's Death Duties (6th Ed.)—
Page 2 27
Page 109 27
Treasury Decision 2530 (Vol. 19, Treasury Decisions, Internal Revenue) 15

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v.

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the United States Board of Tax Appeals (R. 12–22) is reported in 22 B. T. A. 71. The opinion of the Circuit Court of Appeals (R. 47–51) is reported in 60 F. (2d) 890.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered August 5, 1932. (R. 51.) The peti-

tion for certiorari was filed November 4, 1932, and granted December 5, 1932. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS INVOLVED

1. Whether, under Sections 301, 302, and 303 of the Revenue Act of 1924, the gross estate of a nonresident decedent should include the value of intangible property, the physical evidences of which are actually present in the United States.

2. If the statute requires the inclusion of such property, whether it contravenes the Constitution.

STATUTES AND REGULATIONS INVOLVED

These appear in the Appendix, *infra,* pp. 30–32.

STATEMENT

The facts found by the Board (R. 8–11) may be summarized as follows:

Respondents' decedent was a subject of Great Britain, and at the time of his death on October 31, 1924, was a resident of Cuba. At that time he owned securities which were located in New York City. (R. 8.) He was not then engaged in business in the United States (R. 8) and the securities were not pledged, hypothecated, or held as security for any indebtedness (R. 11). Some of the securities were in the possession of the decedent's son in New York City. (R. 11.) They had been held by him for several years, his father having asked him

to take charge of the securities, collect the interest, and deposit it to the decedent's account in a New York bank. (R. 38–39.)[1] The remainder of the securities were in the possession of Lawrence Turnure & Company, in New York City, which collected the income and placed it to the decedent's credit in a drawing account, against which the decedent from time to time drew checks. The Company made a charge for its services. (R. 11.)

The securities consisted of the following (R. 8–11):

Bonds of foreign corporations and accrued interest thereon	$24,384.97
Bonds of foreign governments and accrued interest thereon	55,610.49
Bonds of domestic corporations and accrued interest thereon	460,315.32
Bonds of a domestic municipality and accrued interest thereon	15,073.57
Stock in a foreign corporation	50,000.00

At the time of his death the decedent also had cash on deposit with Lawrence Turnure & Company, New York City, in the amount of $14,517.98. (R. 8.)

Under Cuban law no intervention of any court in Cuba was required for the administration and distribution of decedent's estate. Probate proceedings were initiated in New York in order to secure the release of certain assets. (R. 42.)[1]

The Commissioner included the above property in determining the value of that part of the gross estate of the decedent which at the time of his

[1] These facts are not included in the findings, but appear in the record at the pages cited.

death was situated in the United States. (R. 11.) The Board held that this property was erroneously included in the gross estate (R. 22) and its decision was affirmed by the court below (R. 47–50.)

SPECIFICATIONS OF ERROR

The Circuit Court of Appeals erred—

1. In failing to hold that the stocks, bonds, and cash on deposit were property situated in the United States within the meaning of Section 303 (b) of the Revenue Act of 1924.

2. In holding that the Revenue Act of 1924 did not require the inclusion in the gross estate of a nonresident decedent of the value of intangible property the physical evidences of which are actually present in the United States.

3. In affirming the decision of the Board of Tax Appeals.

SUMMARY OF ARGUMENT

I. The recent decisions of this Court dealing with the power of the States to tax intangibles of nonresidents have no bearing upon the question of the intent of Congress as expressed in the Revenue Act of 1924. The statute antedated these cases, the earliest of them being decided in 1930.

The court below conceded that in 1924 the state of the declared law would afford a good basis for the belief that Congress meant to include the intangibles here involved in the gross estate of a nonresident decedent. At that time the power to tax the transfer of intangibles at the place where the

physical evidence was kept was clearly recognized. The Treasury Regulations dealing with prior Revenue Acts, which were in effect when the Revenue Act of 1924 was adopted, treated intangibles as having a situs of their own. Under familiar rules the executive interpretation of the earlier statutes should be carried into the reenacted statute.

Moreover, the statute indicates on its face that Congress intended to reach the transfer of intangibles if they were physically located in the United States. Two classes of intangibles were expressly excluded from the gross estate, which indicates that all other intangibles similarly situated and not so excepted shall be deemed property within the United States.

The section dealing with domestic stocks was designed to insure their inclusion, whether within or without the United States. This express provision for the inclusion of domestic stock, regardless of the situs of the certificates, can not operate to exclude from the gross estate other intangibles situated in the United States as that phrase was understood when the statute was enacted.

II. The recent decisions of this Court dealing with the power of States to tax intangibles are not applicable here because the rule applied as between the States was adopted to avoid double taxation and to secure parity between tangibles and intangibles, neither of which considerations is important here. The rule applied to the States is based upon the

maxim *mobilia sequuntur personam*, but that is only a fiction of the law which is not of universal application. It is intended for convenience and is not controlling where justice does not demand it. It was invented to prevent escape from taxation and should not be employed otherwise. To apply it here would place intangibles upon a different basis from tangibles. The reason for the rule applied to the States must mark the extent of its application, and since the reasoning is not applicable here, the rule itself may be disregarded.

Moreover, the Federal Government is not limited in the same way as the States in selecting subjects for taxation, and the implication from the cases is that where the Federal Government affords a benefit there is power to tax. The property here involved enjoyed the protection of this Government, and unless the security and protection of the United States is to be made available to aliens on better terms than it is to citizens, the Federal Government must have the power to tax.

The securities in this case were all held as investments, and there is sufficient basis for the contention that the property had acquired a business situs in this country. Its complete enjoyment could be secured by merely keeping it safe and collecting the income, and the absence of other activities, which the character of the property did not demand, is not important.

ARGUMENT

I

THE REVENUE ACT OF 1924 TREATED INTANGIBLES THE EVIDENCES OF WHICH ARE PHYSICALLY PRESENT IN THE UNITED STATES AS PROPERTY SITUATED IN THE UNITED STATES

The Board of Tax Appeals and the court below held that Congress did not intend to include in the gross estate of a nonresident decedent situated in the United States those intangibles owned by him the physical evidences of which are actually present in the United States. The reason assigned by the Board of Tax Appeals for its conclusion was that, under the recent decisions of this Court holding that the situs of intangibles for the purpose of State taxation is at the domicile of the owner,[2] the Government's contention that the intangibles were property "situated in the United States" was unsound. The court below held that since the decisions upon which the Board relied were more recent than the statute, they could not aid in determining what Congress earlier meant by "property situated in the United States."

The court below reached its conclusion that the statute was not intended to embrace the property here involved from an analysis of the terms of the statute itself, although it conceded that (R. 49)—

[2] *Farmers' Loan & Trust Co.* v. *Minnesota*, 280 U. S. 204; *Baldwin* v. *Missouri*, 281 U. S. 586; *Beidler* v. *South Carolina Tax Commission*, 282 U. S. 1; *First National Bank* v. *Maine*, 284 U. S. 312.

At least as to the bonds of domestic corporations, the state of the declared law in 1924 would afford a good basis for the belief that Congress meant to include the intangibles here involved in the gross estate situated in the United States of a nonresident decedent.

We submit that when the statute was enacted in June, 1924, Congress must have intended to include in the gross estate of nonresident decedents the value of intangibles physically located in the United States. In 1902 this Court had declared that the power to tax such property was well established. *Eidman* v. *Martinez,* 184 U. S. 578. In that case this Court considered the application of the inheritance tax imposed by the Act of June 30, 1898, c. 448, 30 Stat. 448, 464, to intangible property belonging to a nonresident alien. Although it was there decided that Congress had limited the application of that statute to transfers made under the laws of the States or Territories, and had thus excluded transfers under foreign laws, the power to tax the transfer of intangibles at the place where the physical evidence was kept was clearly recognized, this Court saying (p. 582):

> The question in each case is not of the power of the legislature to tax the personal property of nonresidents, both tangible and intangible, since that is well established both in England and America, *Mager* v. *Grima,* 8 How. 490, but of its intent to do so by the particular act in question.

That the existence of such power was then unquestioned is further shown by the decision of this Court in 1914 in *Wheeler* v. *Sohmer,* 233 U. S. 434. In that case an estate tax upon the transfer of promissory notes belonging to a nonresident but physically located in the taxing State was upheld, this Court saying (p. 439):

> As to authority, it has been asserted or implied again and again that the States had the power to deal with negotiable paper on the footing of *situs.*

In 1919, *DeGanay* v. *Lederer,* 250 U. S. 376, held that the income from stocks, bonds, and mortgages physically held in the United States by an agent under a power of attorney from a nonresident alien was within the reach of the income tax imposed by the Act of October 3, 1913, c. 16, Sec. II, A, 38 Stat. 166, "upon the entire net income from all property owned and of every business, trade, or profession carried on in the United States by persons residing elsewhere." It was held that such intangibles were property within the United States, and that the maxim *mobilia sequuntur personam* was inapplicable. Relying upon *Blackstone* v. *Miller,* 188 U. S. 189, this Court said (pp. 381–382):

> We have no doubt that the securities, herein involved, are property. Are they property within the United States? It is insisted that the maxim *mobilia sequuntur personam* applies in this instance, and that the situs of the property was at the domicile of

> the owner in France. But this court has frequently declared that the maxim, a fiction at most, must yield to the facts and circumstances of cases which require it; and that notes, bonds and mortgages may acquire a situs at a place other than the domicile of the owner, and be there reached by the taxing authority.

Until 1930, *Blackstone* v. *Miller, supra,* had been cited in this Court with approval many times. Although it was then overruled by *Farmers' Loan & Trust Co.* v. *Minnesota,* 280 U. S. 204, that circumstance must be put out of view in determining the purpose of Congress in 1924 when the ruling in *Blackstone* v. *Miller* was law.

This being the state of the law in 1924, a tax imposed upon the transfer of property "situated in the United States" must be deemed to have been imposed upon intangibles which under the decisions of the Court had a situs here for the purposes of taxation. *Kepner* v. *United States,* 195 U. S. 100, 124. This Court has discerned a Congressional purpose to employ the power to tax income to its fullest extent (*Heiner* v. *Colonial Trust Co.,* 275 U. S. 232, 234–235), and it would be curious indeed if Congress should have withheld the full exercise of its power to tax the transfer of decedents' estates. In considering a statute fairly comparable to the one here involved, and certainly not more explicit, this Court held (in 1919) that the language "net income from all property owned * * * in

the United States by persons residing elsewhere," included the income from intangible property situated in the United States. *DeGanay* v. *Lederer, supra.*

Light is shed upon the meaning to be attributed to the pertinent language of the Revenue Act of 1924 by the construction put upon similar language of prior Revenue Acts by Treasury Regulations in effect at the time of the enactment of the Revenue Act of 1924. The Regulations then in effect construed similar language of the Revenue Acts of 1918 and 1921 as including bonds physically within the United States and moneys owing to foreign residents by domestic debtors.[3] In construing the reenacted statute its language should be interpreted in the light of this administrative construction, for if Congress had desired to exclude such property it would have made its purpose clear in its revision of the Revenue Act in 1924. *Heiner* v. *Colonial Trust Co., supra,* p. 235. Section 403 (b) of the Revenue Acts of 1918 and 1921 indicated the purpose to include in the gross estate of a nonresident decedent "the value of that part of his gross estate which at the time of his death is situated in the United States." This language was reenacted in the Revenue Act of 1924, and Treasury Regulations 68, Article 50, issued thereunder provided as follows:

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[3] Article 60, Regulations 37; Article 53, Regulations 63.

> **Real estate within the United States, stocks and bonds physically in the United States at date of death, moneys due on open accounts by domestic debtors, and stock of a corporation or association created or organized in the United States, constitute property having a situs in the United States.**

Article 50, Regulations 70 (1926 Edition), applicable to the Revenue Act of 1926, and Article 50, Regulations 70 (1929 Edition), applicable to the Revenue Acts of 1926 and 1928, have added bills, notes, and mortgages to the list of intangibles having a situs in the United States. These Regulations have been impliedly sanctioned by the repeated reenactment of the statute.[4] Upon well-settled principles these Regulations have the force of law and are not to be disregarded without cogent reasons. *National Lead Co.* v. *United States*, 252 U. S. 140, 146; *Brewster* v. *Gage*, 280 U. S. 327, 337.

Thus bonds have consistently been included in the gross estates of nonresident decedents in all the Regulations, beginning with those issued under the Revenue Act of 1918. Bonds comprise the main portion of the estate in this case, and the reenactment of the statute in the light of this consistent administrative practice is convincing evidence that Congress intended that they should be treated as property in the United States.

[4] Section 403 (b), Revenue Acts of 1918 (c. 18, 40 Stat. 1057, 1098) and 1921 (c. 136, 42 Stat. 227, 279); Section 303 (b), Revenue Acts f 1924 (*infra*, p. 30) and 1926 (c. 27, 44 Stat. 9, 305; U. S. C. App., Title 26, Sec. 1095).

Although stock of a foreign corporation was first included in the Regulations under the Revenue Act of 1924, the prior Regulations did not expressly limit the estate tax to the class of intangible property therein mentioned and thus did not inferentially exclude such stock. The 1924 Regulations in turn have been impliedly sanctioned by the reenactment of the statute to which they relate, and thus the failure of the earlier Regulations to mention stock of foreign corporations can not limit the purpose of Congress to tax all property within its reach.[5]

Not only does the reenactment of the statute indicate Congressional approval of its settled administrative construction but there is evidence within the statute itself that Congress intended to reach the transfer of intangibles belonging to nonresident decedents.

Section 303 (e) provides that the proceeds of insurance policies upon the lives of nonresident decedents and moneys deposited with any person carrying on the banking business by or for a nonresident decedent who was not engaged in business in the United States shall not be deemed property within the United States. This express exception of certain intangibles physically present in the United States implies that other intangibles simi-

[5] In *Shenton* v. *United States*, 53 F. (2d) 249 (S. D. N. Y.), it was said that it would probably be unwise to place much reliance upon the Regulations. However, that case dealt solely with stock of a foreign corporation.

larly situated and not so excepted shall be deemed to be property situated within the United States. Whatever may have been the reason for the exception, the fact is that Congress realized the necessity of an exception to exclude them from Section 303 (b) and did not exclude bonds and stocks.

Section 303 (d) is not inconsistent with the construction which we suggest. It provides that "stock in a domestic corporation owned and held by a nonresident decedent shall be deemed property within the United States." The court below thought that under the maxim *expressio unius est exclusio alterius* the express inclusion of such intangibles implies the exclusion of others. But the place where the stock was held was not an element in the application of Section 303 (d) which was designed to insure the inclusion of domestic stock, whether physically present in the United States or not. The failure to include other intangibles in Section 303 (d) can not therefore be said to exclude them from 303 (b). Apparently Congress intended that stock in a domestic corporation *wherever held* by a nonresident should be deemed property within the United States, and in accordance with the maxim *expressio unius est exclusio alterius* did not intend that other intangibles held by nonresidents *outside* the United States should be deemed property within the United States. The intangibles in this case were all held in the United States and the maxim has, we submit, no proper application.

This conclusion finds support in the construction put upon Section 202 (c) of the Revenue Act of 1916 (c. 463, 39 Stat. 756), of which Section 303 (d) of the Revenue Act of 1924 is a counterpart. See Treasury Decision 2530. The 1924 Act was similarly interpreted. See Article 50, Regulations 68. The fact that Section 303 (d) was specifically limited to Part I of Title III and was not extended to Part II, which imposed the gift tax, is significant. By Section 319 of Part II (U. S. C., Title 26, Sec. 1131) a tax was imposed "upon the transfer by a nonresident by gift during such calendar year of any property situated within the United States." Unless by Section 303 (d) Congress meant to include in the taxable estate of a nonresident decedent domestic stocks *wherever situated,* no reason is apparent for its not likewise having applied the provision to the gift tax. It is only because Congress meant to extend the estate tax provision to such stock *wherever situated,* and to limit the gift-tax provision to property situated *within the United States,* that it confined the operation of Section 303 (d) to the former.

The Regulations under the gift tax provide as follows with respect to situs (Article 18, Regulations 67):

> *Situs of property.*—The situs of property, both real and personal, for the purpose of the tax is its actual situs. The actual situs of mortgages, bonds, bills and notes, and

> certificates of stock in any corporation or association wherever created or organized is the place where held.

Although the gift tax rates were changed by Section 324 of the Revenue Act of 1926 (c. 27, 44 Stat. 9; U. S. C. App., Title 26, Sec. 1121), no change was made in describing the character of transfers to be taxed. Thus Congress once again sanctioned a regulation dealing with intangibles within the United States upon the footing of situs. Because the gift tax supplements the estate tax the two are *in pari materia*, and Congress must have intended that the same basis as to situs should be applied to the estate tax.

Reading the statute as it must have been understood when enacted, we submit it should be construed to require the inclusion in the gross estate of a nonresident decedent of certificates of stock, bonds, and cash deposits within the United States.

II

THE STATUTE AS SO CONSTRUED IS CONSTITUTIONAL

It appears from the concurring opinion in the court below (R. 51) that at least one of the judges rejected the construction of the statute suggested by the Government solely because he believed the construction for which we contend would raise a grave constitutional question. This doubt is occasioned by recent decisions of this Court holding that for the purpose of death taxes imposed by the States the situs of intangibles is at the domicile of

the owner. Under these decisions intangible property is protected from double taxation as fully as is tangible personalty, and hence must be taxed, if at all, at the domicile of the owner. This rule was predicated upon the due process clause of the Fourteenth Amendment, and the question arises whether the like clause in the Fifth Amendment precludes taxation by the Federal Government of intangibles owned by nonresidents.

The recent decisions of this Court relating to death taxes imposed by the States upon intangibles clearly mark a distinction which we believe is controlling here. In *First National Bank* v. *Maine*, 284 U. S. 312, it was plainly stated that the reason which actuated this Court in departing from the rule that intangibles have a situs of their own was to avoid multiple taxation by the States and to secure parity between tangibles and intangibles. This Court there said (pp. 326–327):

> The rule of immunity from taxation by more than one state, deducible from the decisions in respect of these various and distinct kinds of property, is broader than the applications thus far made of it. In its application to death taxes, the rule rests for its justification upon the fundamental conception that the transmission from the dead to the living of a particular thing, whether corporeal or incorporeal, is an event which can not take place in two or more states at one and the same time. In respect of tangible property, the opposite view must be re-

> jected as connoting a physical impossibility; in the case of intangible property, it must be rejected as involving an inherent and logical self-contradiction. Due regard for the processes of correct thinking compels the conclusion that a determination fixing the local situs of a thing for the purpose of transferring it in one state, carries with it an implicit denial that there is a local *situs* in another state for the purpose of transferring the same thing there. The contrary conclusion as to intangible property has led to nothing but confusion and injustice by bringing about the anomalous and grossly unfair result that one kind of personal property can not, for the purpose of imposing a transfer tax, be within the jurisdiction of more than one state at the same time, while another kind, quite as much within the protecting reach of the Fourteenth Amendment, may be, at the same moment, within the taxable jurisdiction of as many as four states, and by each subjected to a tax upon its transfer by death, an event which takes place, and in the nature of things can take place, in one of the states only.

In order to resolve the confusion and to prevent the injustice referred to by this Court, the maxim *mobilia sequuntur personam* was applied. Upon similar reasoning the Supreme Court of Indiana *declined to apply the maxim* and held that intangibles which had acquired a business situs in Illinois were not taxable at the domicile of the owner in

Indiana. *Miami Coal Co.* v. *Fox*, 176 N. E. 11 (Ind.). The question whether the States are prohibited from taxing intangibles which have acquired a business *situs* in a State other than that of the owner's domicile was specifically reserved in *First National Bank* v. *Maine, supra*, p. 331. However, it has been held that the limitation of the Fourteenth Amendment upon the power of a State to tax the property of its residents which has acquired a permanent situs outside the State does not apply to intangible property, even though it has acquired a business situs and is taxable in another State. *Cream of Wheat Co.* v. *Grand Forks*, 253 U. S. 325. Furthermore, this Court denied certiorari (284 U. S. 625) in *Hill* v. *Carter*, 47 F. (2d) 869 (C. C. A. 9th), where the holding of the court below was that the income accruing to a resident of Hawaii growing out of certain stocks and bonds and bank deposits in New York City was not subject to the Hawaiian income tax. In this situation we think it is evident that the Constitution contains no inexorable principle which requires the unwavering application of the maxim *mobilia sequuntur personam*, but that its application is necessary only where there is need to avoid multiple taxation as between the States. This view is in accord with earlier decisions of this Court, for it has long been recognized that the maxim is but a fiction of the law, that it is not of universal application but intended for convenience, and that it is not controlling where justice does not demand it. *Safe Deposit & T. Co.* v. *Virginia*, 280 U. S. 83, 92.

In *Green* v. *Van Buskirk*, 7 Wall. 139, 150, it was said that this fiction always yields to laws for attaching estates of nonresidents, because such laws necessarily assume that property has a situs entirely distinct from the owner's domicile. See also *St. Louis* v. *The Ferry Co.*, 11 Wall. 423, 430.

It is also true that shares of corporate stock and corporate bonds are treated for tax purposes as property entirely distinct and independent from the property of the issuing corporations. *Bank of Commerce* v. *Tennessee*, 161 U. S. 134, 146; *Dewing* v. *Perdicaries*, 96 U. S. 193, 196; *Wright* v. *Georgia R. R. & Banking Co.*, 216 U. S. 420, 425; *Commissioner* v. *S. A. Woods Machine Co.*, 57 F. (2d) 635 (C. C. A. 1st), certiorari denied October 10, 1932; *United States* v. *Kirby Lumber Co.*, 284 U. S. 1. Accordingly, we submit that a legal fiction, devised to prevent personalty from escaping just taxation (*Safe Deposit & T. Co.* v. *Virginia, supra*, p. 94), should not be given such general application as to prevent Congress from dealing with intangibles situated within the United States on the same basis as any other property within the territorial reach of our laws. The Constitution does not stand in the way unless this sovereign power be exercised in violation of the Fifth Amendment, which has been aptly characterized as an admonition of fair dealing (*Cohan* v. *Commissioner*, 39 F. (2d) 540 (C. C. A. 2d). The only Federal taxing statutes which have fallen before the due process clause have been

those which were deemed to be an arbitrary and capricious exercise of the taxing power. See *Heiner* v. *Donnan,* 285 U. S. 312. Property within the reach of the sovereign power of taxation may not escape taxation when Congress has declared that it shall be taxed. In such cases maxims must be laid aside as "amiable fiction," as was done in *Tyler* v. *United States,* 281 U. S. 497, 503.

The power to tax tangibles is exclusively in the State where the property has an actual situs, and the maxim *mobilia sequuntur personam* does not apply to such property. *Frick* v. *Pennsylvania,* 268 U. S. 473. It has been shown that the maxim is applicable to intangibles so far as the power of the States is concerned, and thus parity is secured between tangibles and intangibles and each class is taxable in only one State. But in considering a tax levied by the Federal Government, parity between tangibles and intangibles will not be secured unless the maxim is disregarded in dealing with both classes of property. Tangible property physically within the United States is undoubtedly property situated within the United States, even though it belong to a nonresident decedent. If intangible property such as bonds, certificates of stock, and cash on deposit physically within the United States is not treated as property situated in the United States then intangible property of a nonresident which enjoys the same protection of this Government as tangibles will be given preferential

treatment. Thus if the test be equal treatment of the two classes of property, the challenge of the tax in this case must fail.

No valid objection can be made to this tax on the ground that it will result in double taxation, because historically the taxing of the same property by one State and the Federal Government has never been regarded as an evil. Both the Federal Government and the States have the power to tax transfers or successions in case of death. *Willcuts* v. *Bunn,* 282 U. S. 216, 226. Both the Federal Government and the States impose taxes upon the same income. Imports are within the taxing power of Congress, and property when imported and commingled with the goods of a State is again exposed to taxation. This subject was considered in *Knowlton* v. *Moore,* 178 U. S. 41, where it was said (p. 60):

> Under our constitutional system both the National and the state governments, moving in their respective orbits, have a common authority to tax many and diverse objects, but this does not cause the exercise of its lawful attributes by one to be a curtailment of the powers of government of the other, for if it did there would practically be an end of the dual system of government which the Constitution established.

Nor is international double taxation to be regarded as an evil against which the Constitution affords protection. While the States are required to

give full faith and credit to the laws of every other State, no country ever takes notice of the revenue laws of another. *Holman* v. *Johnson,* 1 Cowp. 341, cited in Hanson's Death Duties (6th ed.), p. 142. International double taxation is not uncommon (see *Farmers' Loan & Trust Co.* v. *Bowers* (S. D. N. Y.), decided July 7, 1931, reported in 313 C. C. H. 8877); it is a political question with which the courts do not concern themselves. This Court referred to international double taxation as an evil in *Burnet* v. *Chicago Portrait Co.,* 285 U. S. 1, but it was not suggested that the Constitution provided any remedy against it. It is clear enough that the recent cases applying the maxim *mobilia sequuntur personam* to State taxation of intangibles proceed upon the principle "that the right of one State to tax may depend somewhat upon the power of another so to do." *Farmers' Loan & Trust Co.* v. *Minnesota, supra,* p. 211. Plainly there is no such limitation upon the powers of independent nations. Where, as in this case, the intangibles are owned by the subject of a foreign country who does not reside within the United States, they must be taxed if taxed at all at their physical situs and so far as the States and the United States are concerned may not be taxed at the domicile of the owner. We find nothing in the decisions of the Court which prevent State and Federal taxation at the place of their physical situs.

So far as the Fifth Amendment is concerned, it is clear that the power of the Federal Government

with respect to taxation is not restrained to the same extent as the taxing power of the States. This is apparent from what this Court said in *United States* v. *Bennett,* 232 U. S. 299, 305–306:

> But the misapprehension consists not in a misconception as to what the cases relied on decided, but in taking for granted that because the doctrine stated has been applied and enforced in many decisions with respect to the taxing power of the States, that the same principle is applicable to and controlling as to the United States in the exercise of its powers. * * * The application to the States of the rule of due process relied upon comes from the fact that their spheres of activity are enforced and protected by the Constitution and therefore it is impossible for one State to reach out and tax property in another without violating the Constitution, for where the power of the one ends the authority of the other begins. But this has no application to the Government of the United States so far as its admitted taxing power is concerned. It is coextensive with the limits of the United States; it knows no restriction except where one is expressed in or arises from the Constitution and therefore embraces all the attributes which appertain to sovereignty in the fullest sense. Indeed the existence of such a wide power is the essential resultant of the limitation restricting the States within their allotted spheres, for if it were not so then government in the plenary and usual acceptation of

> that word would have no existence. Because the limitations of the Constitution are barriers bordering the States and preventing them from transcending the limits of their authority and thus destroying the rights of other States and at the same time saving their rights from destruction by the other States, in other words of maintaining and preserving the rights of all the States, affords no ground for constructing an imaginary constitutional barrier around the exterior confines of the United States for the purpose of shutting that government off from the exertion of powers which inherently belong to it by virtue of its sovereignty.

The *Bennett case* was followed in *Cook* v. *Tait*, 265 U. S. 47, where it was held that Congress has power to impose a tax upon income received by a native citizen of the United States who at the time the income was received was permanently residing and domiciled in Mexico, and notwithstanding that the income arose from real and personal property in Mexico. In deciding that the situs of the property was not important, this Court said (p. 56):

> * * * the basis of the power to tax was not and can not be made dependent upon the situs of the property in all cases, it being in or out of the United States, and was not and can not be made dependent upon the domicile of the citizen, that being in or out of the United States, but upon his relation as citizen to the United States and the relation of the latter to him as citizen.

The implication from *United States* v. *Bennett* and *Cook* v. *Tait, supra,* is that where the Federal Government affords protection, there is power to tax, limited for practical purposes only by its power to enforce its collection. Although a nonresident alien is involved in the instant case instead of a citizen, it is evident that the same protective relationship exists here because the property of the alien physically in the United States is enjoying the protection of this Government. Doubtless that is one of the reasons why it is here. The security and protection of the United States should not be available to aliens on better terms than it is to citizens. Since the World War the flight of capital from foreign countries for safe-keeping in the United States has been a matter of common knowledge. When an alien seeks a safe harbor for his property in the United States and brings it under the protection of the United States, he should not be permitted to evade the exercise of the sovereign power of taxation by invoking the fiction that the legal situs of the property is at the very domicile from which he has designedly removed it.

Taxes are a portion which each individual gives of his property in order to secure the perfect enjoyment of the remainder. It is the price and consideration paid for the protection afforded. When the property of an individual receives the protection of the United States, it is equally right that the property protected, whether real or personal, and

no matter where the owner has his domicile, should yield a compensation or consideration. Taxes are no more to be levied upon the property of the resident to protect the property of the nonresident than upon the property of the nonresident to protect that of the resident. Desty on Taxation, Vol. 1, p. 53.

Other countries do not permit the maxim *mobilia sequuntur personam* to be invoked in favor of nonresidents so as to place their property, actually in the country, beyond the reach of the taxing power. Hanson's Death Duties (6th ed.), p. 2. Bonds of foreign governments and certificates of shares in a foreign company have been held to be situated in England for the purposes of the death duty. See Hanson's Death Duties (6th ed.), p. 109, where it is said:

> The rule as to the locality of such assets to be gathered from these cases seems to be that they are situate within the jurisdiction where they are found, unless they are incapable of realization without the doing of some act outside that jurisdiction, in which latter case they will be held to be situate within the jurisdiction where such act has to be done.

The property in this case falls into three classes: (1) bonds of foreign corporations and foreign governments and stock in a foreign corporation; (2) bonds of domestic corporations and of a domestic municipality; (3) cash on deposit.

The domestic character of property of the second class was one of the grounds relied upon to justify the conclusion that the property involved in *De-Ganay* v. *Lederer, supra,* was completely localized in the United States.

The property in the third class consists of cash on deposit with an agent in New York City. The Board did not find and the evidence does not indicate that this agent was in the banking business, and thus this class of property is not brought within the exception in Section 303 (e) of the statute. Like the property in the second class, this cash is domestic property and the decedent depended upon the local law to enforce his right to it.

At the time of his death the decedent had retired from business. (R. 7.) All of the intangibles were investments, and their safe-keeping and the collection of the income were the only activities required in connection with property of that character. Under the circumstances it would appear that there is a sufficient basis for the contention that all of the property here involved had acquired a business situs in New York City. This Court has declared that "Intangible personal property may acquire a taxable situs where permanently located, employed and protected" (*Safe Deposit & T. Co.* v. *Virginia, supra,* p. 93); but where property is of such a character that its complete enjoyment may be secured by merely keeping it in a safe place and collecting the income, it would appear to be unreasonable to deny

a business situs because of the absence of activities which the character of the property did not demand.

In *New Orleans* v. *Stempel*, 175 U. S. 309, a tax on credits evidenced by notes and secured by mortgages was upheld where the owner, a nonresident who had inherited the property, left them in Louisiana in the possession of an agent who collected the same as they fell due and deposited the proceeds in a local bank to the credit of the owner. This case was referred to in *Farmers' Loan & Trust Co.* v. *Minnesota, supra,* p. 213, as having depended upon a business situs. There was no element of investment and reinvestment of capital in the *Stempel case,* and the facts which supported a business situs there are also present in the case at bar.

CONCLUSION

It is respectfully submitted that the Estate Tax provisions of the Revenue Act of 1924 were intended to reach intangibles physically present in the United States, and that the inclusion of the property here involved in the gross estate of a nonresident decedent contravenes no provision of the Constitution. The decision of the Circuit Court of Appeals is erroneous and should be reversed.

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JANUARY, 1933.

APPENDIX

STATUTES AND REGULATIONS

Revenue Act of 1924, c. 234, 43 Stat. 253, 303, 304, 305:

> SEC. 301. (a) In lieu of the tax imposed by Title IV of the Revenue Act of 1921, a tax equal to the sum of the following percentages of the value of the net estate (determined as provided in section 303) is hereby imposed upon the transfer of the net estate of every decedent dying after the enactment of this Act, whether a resident or nonresident of the United States:
>
> [Here follow the rates.]
>
> (U. S. C., Title 26, Sec. 1092.)
>
> SEC. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—
>
> (a) To the extent of the interest therein of the decedent at the time of his death which after his death is subject to the payment of the charges against his estate and the expenses of its administration and is subject to distribution as part of his estate:
>
> * * * * *
>
> (U. S. C., Title 26, Sec. 1094.)
>
> SEC. 303. For the purpose of the tax the value of the net estate shall be determined—
>
> * * * * *
>
> (b) In the case of a nonresident, by deducting from the value of that part of his

gross estate which at the time of his death is situated in the United States—

* * * * *

(d) For the purpose of Part I of this title, stock in a domestic corporation owned and held by a nonresident decedent shall be deemed property within the United States, * * *.

(e) The amount receivable as insurance upon the life of a nonresident decedent, and any moneys deposited with any person carrying on the banking business, by or for a nonresident decedent who was not engaged in business in the United States at the time of his death, shall not, for the purpose of Part I of this title, be deemed property within the United States.

* * * * *

(U. S. C., Title 26, Sec. 1095.)

Treasury Regulations 68:

ART. 11. *Specific property to be included.*—The value of all real property situated in the United States and owned by the decedent at the date of his death should be included in the gross estate, whether the decedent was a resident or a nonresident, and whether the property came into the possession and control of the executor or administrator or passed directly to heirs or devisees. Where the decedent was a resident, the value of all personal property owned by him should be included, wherever situated. Where decedent was a nonresident, the value of so much of his personal property as had its situs in the United States at the time of his death should be included, and the value of his entire gross estate, wherever situated, should be disclosed, if deductions are claimed. (See Arts. 52 to 54.) As to the situs of the per-

sonal property of nonresident decedents, see Article 50.

* * * * *

ART. 50. *Situs of property of nonresident decedents.*—Real estate within the United States, stocks and bonds physically in the United States at date of death, moneys due on open accounts by domestic debtors, and stock of a corporation or association created or organized in the United States, constitute property having a situs in the United States. As to the meaning of the term "United States," see Article 5. On the other hand, insurance upon the life of a nonresident, and moneys deposited by or for a nonresident not engaged in business in the United States at the time of his death with any person (for meaning of the term "person," see section 2 (a) (1) of the statute) carrying on the banking business in the United States, are not to be regarded as property situated therein.

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U. S. GOVERNMENT PRINTING OFFICE: 1951